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Supreme Court of the United States

October Term, 1976

No. 76-900

ERIE LACKAWANNA RAILWAY COMPANY,
Petitioner,

vs.

L. F. COLE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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No. _____

ERIE LACKAWANNA RAILWAY COMPANY,
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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner, The Erie Lackawanna Railway Company, prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment rendered, by a divided Court, in Case No. 75-2065, entitled *L. F. Cole, Plaintiff-Appellee v. Erie Lackawanna Railway Company, Defendant-Appellant,* and the order of that Court denying Petitioner's Petition for Rehearing.

That Court erred in refusing to hold that actual notice, timely received, is due notice.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Cole v. Erie Lackawanna Ry. Co.,* 541 F.2d 528 (6th Cir., 1976) and is reprinted in the Appendix attached hereto, *infra,* p. A2.

The first opinion of the District Court is unreported but is printed in the Appendix, *infra*, p. A29. The second opinion of the District Court, is reported as *Cole v. Erie Lackawanna Railway*, 396 F. Supp. 65 (N.D. Ohio, 1975) and is reprinted in the Appendix, *infra*, p. A21.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 19, 1976. On September 2, 1976, a Petition for Rehearing and Suggestion for Rehearing in Banc was filed by Petitioner. Said Petition for Rehearing was denied by Order filed on October 4, 1976. A copy of said Order is printed in the Appendix, *infra*, p. A1. This petition is, therefore, timely.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 19 of this Court.

QUESTION PRESENTED

Where the Supreme Court of the United States has established certain standards for compliance with the notice provision of Section 3 First (j) of the Railway Labor Act, may the United States Court of Appeals for the Sixth Circuit disregard those standards, as promulgated by this Court and as interpreted by other Circuit Courts of Appeals, and hold that an employee who has authorized his union to represent him before a special board of adjustment may stand by with knowledge and notice of what is going on, allow matters to be thrashed out to a conclusion before the board, and, after a decision adverse to him has been rendered by the board, come in for the first time to assert his individual rights?

STATUTORY PROVISIONS INVOLVED

The notice provision of Section 3 First (j) of the Railway Labor Act (45 U.S.C. 153 First (j)) calls for only "due notice" and reads as follows:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

Section 3 Second of the Railway Labor Act (45 U.S.C. Section 153 Second) provides for the constitution of the adjustment board as follows:

> "If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employee. If such carrier or such representative fails to agree upon the establishment of such

a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such

neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such award shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board."

The provisions applicable to proceedings for District Court enforcement of awards of the Adjustment Board are set forth in subparagraph (p) of Section 3 First of the Railway Labor Act (45 U.S.C. 153 First (p)), as follows:

> "If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on

the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."

STATEMENT OF THE CASE

A. Statement of Facts

On April 7, 1971, Respondent was discharged by Petitioner for violation of railroad rules with respect to providing flag protection for property. Respondent's labor union represented him in the investigation of the charges which resulted in his dismissal, and in the ongoing grievance procedure, which included presentation of the claim to the Petitioner's Superintendent at Marion, Ohio.

Throughout the various stages of the grievance procedure, the claim was denied.

Thereafter, Respondent's claim was scheduled to be heard by a special board of adjustment established by labor and management pursuant to the provisions of Section 3 Second of the Railway Labor Act (45 U.S.C. Section 153 Second).

It is undisputed that Respondent knew of the pendency of the proceedings before the special board of adjustment and, according to his own testimony, he actually knew of the hearing date "probably a week before" it occurred, having been informed of it by the local chairman of his union. Respondent expected his union to prosecute his claim and grievance, and it was undisputed that his union representative had notice of the hearing and represented Respondent at that hearing. Admittedly, he did not ask his union not to proceed with the matter. Respondent was also familiar with the union constitution and knew that the union was authorized to represent him unless he advised it to the contrary.

On June 1, 1972, the special board of adjustment denied Respondent's claim.

On April 20, 1973, Respondent filed an "amended petition" in the United States District Court for the Northern District of Ohio, Western Division, wherein he requested the Court to review the award of the special board of adjustment and to set it aside for, among other reasons, failure of the board to give him notice of the hearing.

The petition averred that the District Court's jurisdiction was conferred by 45 U.S.C. Section 153 First (p) and (q).

On October 2, 1973, Respondent filed a motion for summary judgment in support of which he submitted an affidavit that he had never received "due notice" of the board's hearing.

On November 12, 1973, Petitioner filed a cross-motion for summary judgment in which it claimed that the District Court did not have subject matter jurisdiction over the claims presented in Respondent's "amended petition".

On February 6, 1974, the District Court rendered its decision, printed in the Appendix, *infra*, p. A29. The Court set aside the board's decision of June 1, 1972, and remanded the matter to the board for reconsideration on the ground that the board failed to comply with the requirements of 45 U.S.C. Section 153 First (j) in that Respondent was not sent, and did not receive, any notice that his petition was being considered by the board.

Pursuant to the Court's order of remand, the board reconsidered the matter on October 28, 1974. The board modified its earlier decision and set aside the discharge of Respondent, converting it into a disciplinary layoff of 365 days. It also ordered the railroad to comply with the award within thirty days.

Thirty days having elapsed, the Respondent, on December 4, 1974, filed in the District Court a supplemental petition seeking compliance with the board's order of October 28, 1974.

Petitioner opposed compliance and again requested the Court to correct its interlocutory order of February 6, 1974, wherein the Court had granted Respondent's motion for summary judgment on account of the board's alleged failure to comply with the statutory notice provisions.

On May 5, 1975, the Court issued its opinion, order and judgment, in *Cole* v. *Erie Lackawanna Railway*, 396 F. Supp. 65 (1975), reprinted in the Appendix, *infra*, p. A21. The Court ordered Petitioner to comply with the board's award of October 28, 1974.

On June 3, 1975, Petitioner filed in the District Court its notice of appeal from the order and judgment entered on May 5, 1975, and the order entered on February 6, 1974, remanding the matter to the board for reconsideration and denying the Petitioner's cross-motion for summary judgment.

On August 19, 1976, the Court of Appeals for the Sixth Circuit, by a divided Court, affirmed the judgment of the District Court, and, on October 4, 1976, denied Petitioner's Petition for Rehearing and Suggestion for Rehearing in Banc.

Petitioner now seeks review of the Court of Appeals' decision of August 19, 1976 and of its order of October 4, 1976, denying the Petition for Rehearing.

B. Decisions of the District Court

The District Court's decision of February 6, 1974, printed herein in the Appendix, *infra*, p. A29, was grounded upon the failure of the special board of adjustment to give formal statutory notice of the hearing to Respondent. As the Court stated:

> "It is apparent to this Court that Public Law Board No. 855 failed to comply with the requirements of subsection (j). The record shows that petitioner [Mr. Cole] was not sent, and did not receive, any notice that his petition was being considered by the Board. Having been deprived of due notice, he was

surely deprived of the right to appear either in person or through counsel as the statute permits." (App. pp. A35-A36; footnote omitted).

Thus, in its first decision, the District Court did not discuss the issue of whether Respondent may have had "actual notice" of the hearing sufficient to fulfill the requirements of Subsection (j) despite the board's failure to give formal notice of the hearing.

In its second opinion printed herein at p. A21, the District Court briefly discussed the question of "actual notice." Citing *Hunter v. Atchison, T. & S. F. Ry. Co.*, 188 F.2d 294 (7th Cir. 1951), the Court defined the kind of notice or knowledge required by Section 3 First (j) to be "[a]ctual notice of the hearings for a sufficient period prior thereto to permit [plaintiff] to be present and to be heard * * *." (App. p. A24).

Petitioner submits that Respondent uncontrovertibly knew of the scheduled hearing for a sufficient period prior thereto (by his own admission, "probably a week before,") to permit him to be present and to be heard.

Yet, the District Court, without indicating what its doubts were, found there to be "compelling doubts that he had any such knowledge in sufficient time to permit him to retain counsel, gather his witnesses and be present at the Board's hearing so as to be heard." (App. p. A24). The District Court then goes on to hold that "all doubts would have been removed if the Board itself had simply served formal notice on the plaintiff of the pendency of its proceedings." (App. p. A24).

After discussing Respondent's union representation, the District Court ordered enforcement of and compliance with the board's award of October 28, 1974.

C. Decision of the Court of Appeals

The opinion of the Court of Appeals was delivered by Circuit Judge Celebrezze and was joined in by Circuit Judge Peck. Circuit Judge Engel filed a separate dissenting opinion. The majority first holds that the District Court did have jurisdiction to review the board's determination. It then holds that the District Court did not err in applying the notice requirements of 45 U.S.C. Section 153 First (j) to a special adjustment board proceeding. Finally, the majority discusses the issue of whether Respondent had in fact received sufficient notice of the June 1972 hearing before the board to satisfy the notice provision.

In regard to this question of "actual notice", the majority correctly holds that "the Board's failure to furnish formal notice to Appellee does not in this instance resolve the notice question." (App. p. A13). The majority stated that, "We agree with a line of Seventh Circuit decisions which have expanded on *Burley I* and *Burley II* [*Elgin, J. & E. Ry. Co. v. Burley* (*Burley I*), 325 U.S. 711 (1945); *Elgin, J. & E. Ry. Co. v. Burley* (*Burley II*), 327 U.S. 661 (1946)] to hold that in situations where employee-grievants have authorized their union to handle their grievances NRAB statutory notice provisions are satisfied if the employee receives actual notice of the proceedings." (App. p. A13).

The majority then, however, citing no authority, goes on to define "actual notice" as:

> ". . . notice of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." (App. p. A14).

The Court then finds that "Appellee's actions leave little room for doubt about his reliance on the UTU to handle his claim before the special adjustment board, . . ." (App. p. A14). And, after reviewing portions of Respondent's testimony, the majority finds that "Appellee's statements indicate that he knew in advance that the Board would be conducting a hearing on his claim." (App. p. A16).

The Court then went on:

> "However, Appellee's statements also vividly demonstrate that he did not understand the workings of the Board. His reference to the Board as the 'Labor Relations Board' and his requests to be present and present witnesses are further indicia of his lack of understanding. Appellant has not attempted to refute Appellee's statements concerning the union officials telling him that he could not attend the hearing on his claim and that his witnesses would not be needed. Thus the only inference which may be drawn from the record is that Appellee was not allowed to convey information which might have been helpful in presenting his claim. *The union cannot contend that Appellee's right to effective presentation of his claim to the Board, as guaranteed by Section 153 First (j), has been preserved when he was prevented from conveying potentially helpful information to the Board via union officials.* Appellee did not receive notice sufficient to obviate the provision to him of formal notice as required by Section 153 First (j)." (App. p. A16; Emphasis added).

Petitioner contends that the United States Court of Appeals for the Sixth Circuit erred in that:

(1) Its definition of "actual notice" is in conflict with previous decisions of this Court;

(2) Its holding that individual notice is required even though the employee authorized his union to prosecute his claim is in conflict with previous decisions of this Court;

(3) Its definition of "actual notice" is in conflict with the standard applied by other Courts of Appeals;

(4) Even applying the Court of Appeals' standard, the Court erred in finding that Respondent did not receive "actual notice" in the instant case.

In his dissenting opinion, Circuit Judge Engel first stated his agreement with the majority that the District Court had jurisdiction to exercise a limited judicial review over the board's determination and that the notice provisions of Section 153 First (j) apply to proceedings before special adjustment boards. He dissented, however, from the majority holding that Respondent did not receive notice sufficient to satisfy Section 153 First (j), "especially in view of the majority's clearly supported finding that the appellee authorized the U.T.U. to handle his grievance, both personally and by virtue of the authorization contained in Article 44 of the U.T.U. Constitution." (App. p. A17).

Noting that Respondent had himself acknowledged that he knew in advance that the board would be conducting a hearing on his claim and that he expected the union to represent him personally (App. p. A17), Judge Engel stated:

> "Apparently, the majority opinion holds what the Supreme Court in *Burley II* expressly ruled it would not hold:

'. . . that any employee can stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property, or before the board on their submission, allow matters to be threshed (sic) out to a conclusion by one method or the other, and then come in for the first time to assert his individual rights.' *Burley II, supra,* at 666." (App. pp. A17-A18).

After finding the dictates of *Burley* to have been satisfied both by the authority granted the union by Respondent and by the actual knowledge possessed by Respondent (App. pp. A18-A19), and after discussing the line of Seventh Circuit decisions, Judge Engel discussed the result of the majority's decision:

"The effect of the majority opinion, as I see it, is to give the employee and the union a second bite of the apple merely by their mutual agreement that union representation was inadequate, a confession easy to make when the union suffers no penalty and difficult, if not impossible, to refute by the Board or the carrier since neither has been privy to the incident." (App. pp. A19-A20).

Judge Engel found the better course to be to leave the employee to his remedy against the union for breach of its duty of fair representation (App. p. A20), and accurately stated that "The difficulty is not in the notice; it is in the advice which the union gave Cole after the notice." (App. p. A20). The union is not, and never has been, a party to the instant litigation.

ARGUMENT

A. The United States Court of Appeals for the Sixth Circuit Has Rendered a Decision Concerning an Important Issue of Federal Law and National Labor Policy, Which Decision Is in Conflict With Prior Decisions of This Court and With Prior Decisions of the United States Court of Appeals for the Seventh Circuit.

The decision rendered herein by the United States Court of Appeals for the Sixth Circuit is in conflict with prior decisions of this Court and with prior decisions of the Court of Appeals for the Seventh Circuit in the following aspects:

(1) The standards established by the Court of Appeals in regard to what is required in order for an employee to be deemed to have received "actual notice" sufficient to satisfy the notice provisions of Section 3 First (j) of the Railway Labor Act are contrary to those standards established by this Court in *Elgin, J. & E. Ry. Co. v. Burley* (*Burley II*), 327 U.S. 661 (1946).

(2) The Court of Appeals' holding that Section 3 First (j) of the Railway Labor Act requires notice to both the employee and the union, which admittedly was authorized to represent him, is contrary to this Court's construction of the statute as stated in *Elgin, J. & E. Ry. Co. v. Burley* (*Burley I*), 325 U.S. 711 (1945), and *Czosek v. O'Mara,* 397 U.S. 25 (1970).

(3) The Court of Appeals' discussion of "actual notice" and what is necessary to support a finding of "actual notice" is contrary to decisions of the United States Court of Appeals for the Seventh Circuit, including *Kotakis v.*

Elgin, J. & E. Ry. Co., 520 F.2d 570 (7th Cir. 1975), and *Hunter v. Atchison, T. & S. F. Ry. Co.*, 188 F.2d 294 (7th Cir. 1951).

Each of these conflicts will be discussed in the following sections.

(1) The standards established by the Court of Appeals in regard to what is required in order for an employee to be deemed to have received "actual notice" sufficient to satisfy the notice provision of Section 3 First (j) of the Railway Labor Act are contrary to those standards established by this Court in Burley II, supra.

After recognizing that, in situations where employee-grievants have authorized their union to handle their grievances, NRAB statutory notice provisions are satisfied if the employee receives actual notice of the proceedings, the majority arbitrarily defines "actual notice" as follows:

> "Actual notice for this purpose is notice of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." (App. p. A14).

This arbitrary definition, for which the Court of Appeals cites no authority, is much more cumbersome than the notice requirements discussed by this Court in *Burley II, supra*.

After noting that it had not undertaken to define "due notice" in *Burley I, supra,* and was not undertaking to do so in *Burley II*, this court nevertheless discussed the elements of notice at page 666 of the *Burley II* opinion, footnote 9:

> ". . . 'Due notice' conceivably could be given or had in a variety of forms, more especially when account is taken of the generally informal procedure of the Board. It would require at the least, we think, knowledge on the aggrieved employee's part of the pendency of the proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency."

Unquestionably, Respondent had "knowledge . . . of the pendency of the proceedings . . ." In fact the Court of Appeals found that "Appellee's statements indicated that he knew in advance that the Board would be conducting a hearing on his claim." (App. p. A16). Respondent's uncontroverted testimony provides ample evidence of his knowledge of the pendency of the hearing:

> "Q. Well, specifically, you knew there was going to be a Board hearing; is that right?
>
> A. Oh yes, because I was up to Murphey's [Local Chairman] office before the Board hearing, a few days before the Board hearing and I was told there was going to be the Board hearing.
>
> Q. And that was to be held in Cleveland?
>
> A. Yes, with three members.
>
> Q. So you knew that two or three days before?
>
> A. Yes.
>
> Q. From what Murphey had told you?
>
> A. Yes.
>
> Q. That there was going to be a Board hearing?
>
> A. Yes—I would say it was probably a week before." (Respondent's deposition, page 25).

As is readily apparent from his own testimony, Respondent not only had "knowledge . . . of the pendency of

the proceedings . . ." he knew, "probably a week before," that the hearing was to occur, where it was to occur, and how many members of the board would hear his claim. Yet, the Court of Appeals finds that Respondent did not have actual notice, apparently because "he did not understand the workings of the Board." (App. p. A16).

In *Burley II, supra*, this Court states at pages 666-667:

> ". . . Although under our ruling his rights to have voice in the settlement are preserved, whether by conferring with the carrier and, having seasonably done so, refusing to be bound by a settlement reached over his protest, or by having representation before the Board according to his own choice, we did not rule, and there is no basis for assuming we did, that an employee can stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property, or before the Board on their submission, allow matters to be thrashed out to a conclusion by one method or the other, and then come in for the first time to assert his individual rights. No such ruling was necessary for their preservation and none was intended."

In the instant case, the Court of Appeals for the Sixth Circuit has condoned exactly those actions which this Court has stated that it would not condone; i.e. after having found that Respondent relied upon and authorized his union to handle his claim before the special adjustment board (App. pp. A14-A15), and after having found that Respondent knew in advance that the board would be conducting a hearing on his claim (App. p. A16), the majority nevertheless has allowed Respondent to stand by with

knowledge of what was going on with reference to his claim, to allow matters to be thrashed out to a conclusion, and then to come in for the first time to assert his individual rights, all because the majority felt Respondent did not understand the workings of the Board, and because his union (not a party to this litigation, but concededly authorized to represent him before the Board), allegedly gave him bad advice.

Because the majority's holding conflicts with this Court's holding in *Burley II, supra,* the petition for certiorari should be granted and the judgment of the Court of Appeals reversed.

(2) The Court of Appeals' holding that Section 3 First (j) of the Railway Labor Act requires notice to both the employee and the union, which admittedly is representing him, is contrary to this Court's construction of the statute as stated in Elgin, J. & E. Ry. Co. v. Burley (Burley I), 325 U.S. 711 (1945), and Czosek v. O'Mara, 397 U.S. 25 (1970).

The majority clearly holds that Respondent authorized the union to prosecute his individual claim:

> "A review of the record demonstrates that Appellee authorized the UTU to handle his grievance. The union represented Appellee in dealing with the carrier. When these efforts met with no success Appellee authorized the union to attempt to secure relief for Appellee from a special adjustment board. Appellee's actions leave little room for doubt about his reliance on the UTU to handle his claim before the special adjustment board, but any existing doubt must be resolved in favor of authorization in light of Article 44 of the UTU Constitution which grants the

union 'complete authority' to represent members before any 'board or other tribunal.'" (App. pp. A14-A15; footnote omitted).

Despite this clear finding of union authorization to process the claim, the majority nevertheless holds that Respondent was entitled to individual notice of the board hearing. This holding is contrary to prior decisions of this Court.

In discussing the provisions of the Railway Labor Act in *Burley I, supra,* this Court said of the employee's rights thereunder:

> "They are statutory rights, which he may exercise independently *or* authorize the union to exercise in his behalf." *Burley I, supra,* 740, n.39. (Emphasis added).

This view was reaffirmed by the Court specifically with reference to the provisions of Section 3 First (j) of the Act in *Czosek* v. *O'Mara,* 397 U.S. 25, 28 n.1 (1970). Having chosen to authorize the union to exercise his statutory rights on his behalf, Respondent waived the option to exercise those rights independently, including the right to individual notice under Section 3 First (j).

And, as Judge Engel aptly noted in his dissenting opinion:

> "The question of actual notice is important only insofar as it infers authority by estoppel. 'Even the ordinary law of agency attributes authority to a representative to act when the principal stands by with knowledge or notice of his assumption of that authority and permits the third person to act to his injury upon the same assumption.' *Burley II, supra,* at 665 n.7." (App. p. A18).

See also, *Pyzynski v. New York Cent. Rd. Co.,* 421 F.2d 854, 859-860 (2d Cir. 1970)

Thus, the majority's holding that individual notice is required by Section 3 First (j) of the Act when the union has clearly been authorized to process the claim on the employee's behalf is contrary to this Court's holdings in *Burley I, supra,* and *Czosek* v. *O'Mara, supra.* This petition for certiorari should therefore be allowed.

(3) The Court of Appeals' discussion of "actual notice" and what is necessary to support a finding of "actual notice" is contrary to decisions of the United States Court of Appeals for the Seventh Circuit, including Kotakis v. Elgin, J. & E. Ry. Co., 520 F.2d 570 (7th Cir. 1975) and Hunter v. Atchison, T. & S. F. Ry. Co., 188 F.2d 294 (7th Cir. 1951).

In the 1975 case of *Kotakis v. Elgin, J. & E. Ry. Co., supra,* a former railroad employee sought review of an award of the National Railroad Adjustment Board and alleged conspiracy between the union and the railroad to deprive him of his right to proper representation by the union. Among his contentions was failure of the Board to provide him with due notice as required by Section 3 First (j). The Seventh Circuit dealt rather summarily with this contention at page 576 of its opinion:

> "As to plaintiff's contention that the Adjustment Board award was a nullity for failure to provide him written notice of the Board's hearings under Section 3 First (j) of the Act (45 U.S.C. §153 First (j)), since Count I of the complaint does not attack the failure of the Board to give such notice and no such argument was made in the district court, it is not properly before use. *Moreover, the record discloses*

that plaintiff knew his grievance had been submitted to the Adjustment Board and that he had authorized the union to represent him there. That satisfies the notice requirement. Elgin, Joliet & Eastern Railway Co. v. Burley, 327 U.S. 661, 666-667, 66 S. Ct. 721, 90 L. Ed. 928." (footnote omitted; emphasis added).

Under the *Kotakis* ruling, Respondent, having been found by the majority to have had knowledge of the hearing and to have authorized the union to represent him there, would unquestionably have been found to have had notice sufficient to satisfy the notice requirement of Section 153 First (j).

And, in *Hunter v. Atchison, T. & S. F. Ry. Co., supra,* the Seventh Circuit first reviewed the applicable case law at pages 299 to 301 of its opinion, reaffirming the view that formal notice is not an essential condition precedent and that "actual notice" may satisfy the statutory notice requirements. At page 301, the Court defined "actual notice" as follows:

"Actual notice of the hearings for a sufficient period prior thereto to permit plaintiffs to be present and to be heard is all that is required. This is a proceeding in equity, and any plaintiff who had actual notice of the hearings, *or* authorized the Santa Fe to represent him thereat, is estopped from relying on the Board's failure to serve formal notice thereof upon him." (Emphasis added).

In the instant case, Respondent knew of the date of the hearing, "probably a week before," surely "a sufficient period prior thereto to permit [plaintiff] to be present and to be heard. . ." The fact that he was not present and was not heard individually (apparently because his local chairman told him it was unnecessary) has no bearing upon the sufficiency of the notice.

Furthermore, the Seventh Circuit recognized that, in any event, no individual notice was required if the employee had authorized another to represent him at the hearing and if the authorized party received due notice. Since the Sixth Circuit clearly found that Respondent herein had authorized the union to represent him, its decision is also in conflict with the Seventh Circuit insofar as it requires both employee authorization to the union to prosecute his individual claim *and* formal or actual notice to the individual.

The Court should grant this petition for certiorari in order to resolve the conflict between the decisions of the Sixth and Seventh Circuits.

B. Even Assuming the Court of Appeals' Definition of "Actual Notice" to Be a Correct One, the Court Erred in Holding That Respondent Had Not Received Such "Actual Notice".

It should first be noted that the majority holds Respondent not to have received "actual notice" even under circumstances in which the majority admits that: (1) the employee authorized his union to represent him in presenting his grievance to the railroad (App. p. A14); (2) the employee authorized and relied upon his union to attempt to secure relief from, and handle his claim before, a special adjustment board (App. p. A14); (3) the union's constitution grants the union "complete authority" to represent the employee before any "board" (App. pp. A14-A15); (4) both the union and the employee knew in advance when the hearing before the board was scheduled (App. p. A16); (5) it was undisputed that the union representative did in fact attend the hearing and present the employee's claim to the board.

Yet, in the face of all these findings, the majority holds that Respondent did not receive "actual notice", having defined "actual notice" as "notice of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." Even assuming, *arguendo*, that the majority is correct in its definition, the fact is that Respondent did in fact receive such "actual notice", "probably a week before" the hearing occurred. Certainly one week's time is sufficient to allow Respondent to consult with and relay information to union officials. In fact, he received the notice from a union official and, accordingly, was consulting with a union official (his Local Chairman, Murphey) at the very time he received the notice!

Thus, it is clear from the record that the majority did not affirm the lower Court's decision because the Respondent did not receive "actual notice", but rather because the *union* allegedly did not afford him the opportunity to present possibly relevant information to its own officials. The carrier, and the carrier alone, is being chastised for the sins of the union, when the carrier had no way of knowing what advice union officials had given to the employee, and, in any event, had no control over what advice the union gave its members.

The burden which the majority's opinion places upon the carrier is an impossible one. The carrier must now ascertain that the board has given notice of the hearing to the employee. It must then ascertain that that notice was given sufficiently in advance of the hearing to enable the employee to consult with union officials and to relay whatever information he may have to them. And finally

it must ascertain that the union has afforded him the opportunity for such consultation, has correctly informed him of the nature of the proceedings, and has accurately explained his rights to him. If it does not do all of these things, the carrier may well find itself in the position of this Petitioner, where, having relied upon the authority of the union to represent the grievant, and, having pursued the course of action prescribed by Section 153 Second, it is suddenly faced with a disgruntled employee who claims not to have been told *by the union* the nature of the proceedings before the special board of adjustment, and by a union which confesses guilt, "a confession easy to make when the union suffers no penalty and difficult, if not impossible, to refute by the Board or the carrier since neither has been privy to the incident." (J. Engel's dissent, App. pp. A19-A20).

The practical effect of the majority's opinion is a simple one: an employer may no longer assume that the union is doing its job. It must become a watchdog, closely scrutinizing the actions of union officials to be certain that they are properly representing their members (a prospect which we cannot believe a union would look favorably upon). But how is the carrier to control those union officials when it discovers that they have not satisfactorily performed their obligations to their members? What should the employer do? The majority does not deal with these questions.

The employee's remedy, if he has in fact been wronged, is not against the carrier, but against the union. In the instant case, the Court of Appeals for the Sixth Circuit has so far departed from the established federal law as to call for an exercise of this Court's power of supervision.

CONCLUSION

For all the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING EN BANC

(Filed October 4, 1976)

No. 75-2065

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

L. F. COLE,
Plaintiff-Appellee,
v.
ERIE LACKAWANNA RAILWAY COMPANY,
Defendant-Appellant.

ORDER

Before: CELEBREZZE, PECK and ENGEL, *Circuit Judges.*

Appellant filed a petition for rehearing with suggestion for rehearing in banc. No judge of this Court having moved for a rehearing in banc, the petition to rehear has been referred to the panel which heard the original appeal.

Upon consideration, the Court being advised, it is ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

OPINION OF THE COURT OF APPEALS

(Filed August 19, 1976)

No. 75-2065

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

L. F. COLE,
Plaintiff-Appellee,

v.

ERIE LACKAWANNA RAILWAY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Ohio, Western Division.

Before: CELEBREZZE, PECK and ENGEL, *Circuit Judges.*

CELEBREZZE, *Circuit Judge,* delivered the opinion of the Court, in which PECK, *Circuit Judge,* joined. ENGEL, *Circuit Judge* (pp. 15-18), filed a separate dissenting opinion.

CELEBREZZE, *Circuit Judge.* L. F. Cole (hereinafter Appellee) was discharged in 1971 by the Erie Lackawanna Railway Company (hereinafter Appellant) for alleged unsatisfactory job performance. Following unsuccessful grievance efforts, Appellee, pursuant to 45 U.S.C. § 153

Second[1] of the Railway Labor Act, sought relief from a special board of adjustment. Section 153 is a lengthy statute, spanning some eight pages. The bulk of the section is devoted to establishing the National Railroad Adjustment Board (hereinafter the NRAB) and setting out its powers and duties. Section 153 Second, added by amendment in 1966, empowers carriers and their employees to set up local special adjustment boards to resolve claims which

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1. Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board, for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in any agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so

(Footnote continued on following page)

would otherwise be filed with the NRAB or which have remained on the NRAB docket for over a year.

In 1926 Congress first authorized carriers and their employees to establish boards of adjustment to resolve minor disputes.[2] However, the 1962 Act was fraught with problems in that no sanctions for failure to reach agreement were provided and failure to agree was commonplace as

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(Continued from previous page)

designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

2. The history of the arbitration provisions of the Railway Labor Act has been thoroughly reviewed in a recent Fourth Circuit opinion, *Employees Protective Association v. Norfolk & W. Ry.*, 511 F.2d 1040, 1043-44 (4th Cir. 1975), and in a number of Supreme Court opinions cited therein: *Brotherhood of Railroad Trainmen v. Chicago R. & I. R.R.*, 353 U.S. 30 (1957); *International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963); *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972).

these early boards of adjustment were composed of equal members of employee and carrier representatives.

In 1934 Congress established the NRAB to provide a nationwide arbitration mechanism for resolving minor disputes between individual employees and carriers. The NRAB is divided into four divisions, each division hears claims from employees in particular job classifications. The NRAB sits in panels of three, one carrier-designated member, one member designated by employee representatives and one neutral panelist designated by the National Mediation Board.

The 1934 Act also carried forward authority to establish carrier, group or regional boards similar to those authorized in the 1926 Act. The above-noted problems with the early carrier-employee adjustment boards continued and such boards were seldom established. The result was the development of a backlog of thousands of claims awaiting disposition by the NRAB. In 1966, in response to this backlog, Congress amended the Railway Labor Act by adding Section 153 Second altering the structure of special adjustment boards to include a neutral panelist and authorizing such boards to hear claims otherwise referable to the NRAB.

Section 153 Second authorizes a carrier or group of carriers and representatives of the employees of such carrier or carriers to agree to the formation of a special adjustment board. If a carrier or union requests the formation of such a board and the nonrequesting party does not agree to the formation of a board within thirty days of the date of the request, the National Mediation Board is empowered to name a representative for the nonagreeing party. If the carrier and union representatives are unable to agree on the proper disposition of a claim, the

National Mediation Board is also empowered to appoint a neutral member to break the deadlock.

In 1971 Appellant and the United Transportation Union (hereinafter UTU), pursuant to an agreement, established a special adjustment board, Public Law Board No. 855 (hereinafter the Board), to resolve seven specified employee claims. Appellee's claim was one of the seven submitted to the Board.

In June of 1972, the Board, following its initial consideration of Appellee's claim, concluded that he had been dismissed for just cause and denied the claim. In April of 1973 Appellee filed an amended petition in district court seeking review of the Board's determination. In February of 1974 the district court granted Appellee's motion for summary judgment. The district court concluded that the Board had failed to provide Appellee with notice of its proceedings as required by 45 U.S.C. § 153 First (j).[3] The district court remanded the action to the Board. In October of 1974 the Board reconsidered its original determination and set aside Appellee's discharge, converting it into a 365-day disciplinary layoff, and ordered reinstatement and back pay for that portion of the layoff period in excess of 365 days. In December of 1974 Appellee petitioned the district court for enforcement of the Board's October determination. In May of 1975 the district court sustained Appellee's second motion for summary judgment and ordered Appellant to comply with the Board's determination.[4] Appellant brings this appeal from the district court's enforcement order.

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3. (j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

4. *L. F. Cole v. Erie Lackawanna Ry.*, 396 F. Supp. 65 (N.D. Ohio 1975).

Appellant raises three issues in challenging the district court's order. Appellant contends that the district court lacked jurisdiction to review the Board's determination. Appellant next argues that the district court erred in applying the notice requirements of 45 U.S.C. Section 153 First (j) to a special adjustment board proceeding. Finally, Appellant argues that even if Section 153 First (j) applies to special adjustment board proceedings, Appellee received sufficient actual notice of the June 1972 hearing before the Board to satisfy the notice provision.

Appellant first contends that Section 153 First (q),[5] which makes district court review available to a party aggrieved by the failure of the NRAB to make an award or by the terms of an award, does not apply to determinations of special adjustment boards. Appellant notes that Section 153 Second which empowers the establishment of special adjustment boards, does not expressly incorporate Section 153 First (q). Appellant further notes that Section 153 Second and Section 153 First (q) were added

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5. (q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

by 1966 amendments to the Railway Labor Act contained in a single piece of legislation. Appellant thus concludes that if Congress had intended to make Section 153 First (q) applicable to special adjustment board proceedings it would have so stated in the text of the statute. Appellant cites no judicial authority for this proposition. Appellant also makes no attempt to analyze the legislative history of the 1966 amendments. Appellant's only analysis of this issue, other than the statutory construction argument, is contained in a short paragraph at page 14 of its brief to the Court:

> The proceedings by way oof [sic] the Special Law Boards were designed to provide labor and management an expeditious way of handling minor disputes without going to the National Railroad Adjustment Board. There was no reason why the Special Law Board proceedings had to be handled in the same way that proceedings were handled in the National Railroad Adjustment Board.

Appellee responds by arguing that a review of the legislative history of the 1966 amendments demonstrates that Congress intended that parties to special adjustment board proceedings have the same access to limited district court review as would parties to NRAB proceedings. The purpose of the 1966 Amendments is set out in Senate Report No. 1201.[6] The Senate Report states that the purpose of the amendment was "to eliminate the large backlog [of cases pending before the NRAB] . . . and to provide equal opportunity for limited judicial review of awards of the [NRAB] to employees and employers."[7] The Report further states:

6. 1966 U.S. Code Cong. and Admin. News, pg. 2285 *et seq.*

7. *Id.* at 2285-2286.

> The bill also provides that judicial review of orders of the National Railroad Adjustment Board, *and of boards established under this legislation,* relating to minor disputes in the railroad industry would be available to either party but limited to the determination of questions traditionally involved in arbitration legislation—whether the tribunal had jurisdiction of the subject, whether the statutory requirements were complied with, and whether there was fraud or corruption on the part of a member of the tribunal. [Emphasis added.][8]

It is clear from the above legislative history that Congress intended the district courts to exercise limited judicial review over determinations of the NRAB and over determinations of special adjustment boards. We affirmed a district court conclusion to this effect in *Switchmen's Union v. Clinchfield R.R.*, 427 F.2d 161 (6th Cir.), *cert. denied*, 400 U.S. 824 (1970). *Accord, Transportation-Communication Division—Brotherhood of Ry. Workers v. St. Louis-San Francisco Ry.*, 419 F.2d 933, 935 (8th Cir. 1969); *Slagley v. Illinois Central R.R.*, 397 F.2d 546, 550-51 (7th Cir. 1968).

Appellant next argues that the notice requirements of Section 153 First (j) do not apply to special board proceedings and consequently the district court erred in overturning the June 1972 judgment of Public Law Board No. 855 for failure to afford Appellee notice which satisfied Section 153 First (j). Appellant's second argument is a remake of its first argument. Appellant contends that Section 153 First (j) does not apply in special board proceedings because it was not expressly incorporated in Section 153 Second. Again, Appellant cites no judicial

8. *Id.* at 2289.

authority for this contention. The district court concluded that Appellant's position on this issue "ignores the legislative history, as well as the plain language, of the statute."[9] One of the passages from the legislative history of the 1966 amendments which we quoted in discussing the first issue raised by Appellant supports the district court's conclusion on this issue:

> The bill also provides that judicial review of orders of the National Railroad Adjustment Board, and of boards established under this legislation, relating to minor disputes in the railroad industry would be available to either party but limited to the determination of questions traditionally involved in arbitration legislation—whether the tribunal had jurisdiction of the subject, *whether the statutory requirements were complied with,* and whether there was fraud or corruption on the part of a member of the tribunal. [Emphasis added.][10]

We concluded above that Section 153 Second incorporated Section 153 First (q) by implication, thereby allowing parties to special board proceedings to secure review in district court. The above quoted passage from the Senate Report on the 1966 amendments indicates that Congress also contemplated the incorporation of procedural requirements such as the notice provisions of Section 153 First (j). The Congressional purpose in authorizing the creation of special adjustment boards was to relieve the congested dockets of two of the four divisions of the NRAB. Congress was seeking to secure the speedy resolution of employee claims originally envisioned by the framers of

9. *L. F. Cole v. Erie Lackawanna Ry.*, No. C73-70 (N.D. Ohio Feb. 6, 1974), Appendix at 28.

10. 1966 U.S. Code Cong. and Admin. News, 2285, at 2289.

the 1934 Act which created the NRAB. Congress envisioned special adjustment boards as local extensions of the NRAB. It is clear that special adjustment boards have jurisdiction coextensive with that of the NRAB. Appellant has advanced no good reason why the statutory procedural rights afforded to employees whose claims are heard by special adjustment boards should be less than those enjoyed by employees whose claims are resolved by the NRAB. We therefore conclude that Section 153 First (j) applies to proceedings before special adjustment boards.

Finally, Appellant argues that the district court erred in concluding that Appellee did not receive notice sufficient to satisfy Section 153 First (j) prior to the Board's initial consideration of his claim. Appellant concedes that the Board did not furnish Appellee formal notice, but contends that Appellee had actual notice of the Board proceedings.

The seminal discussion of actual notice in this context is contained in *Elgin, J. & E. Ry. v. Burley,* 325 U.S. 711 (1945), (*Burley I*), and *Elgin, J. & E. Ry. v. Burley,* 327 U.S. 661 (1946), (*Burley II*). In *Burley I* the Supreme Court stated that an employee who has filed a claim with the NRAB has rights to

> "notice, hearing and individual representation according to his choice. All these rights are separate and distinct, though closely related. A surrender or delegation of one would not result in surrender of the others as a matter of law or necessarily as a matter of fact."[11]

In *Burley II* the Court noted that frequently an employee will authorize a collective agent to deal with the carrier

11. 325 U.S. at 746.

in resolving a grievance. The Court elaborated on its *Burley I* statement concerning notice:

> It is not likely that workingmen having grievances will be ignorant in many cases either of negotiations conducted between the collective agent and the carrier for their settlement or of the fact that the dispute has been submitted by one or the other to the Adjustment Board for determination. * * *
>
> In view of these facts there cannot be many instances in which an aggrieved employee will not have knowledge or notice that negotiations affecting his claim are being conducted, or, if they fail, that proceedings are pending before the Board to dispose of it.
>
> We pointed out in the former opinion that § 3 First (j) expressly provides that "the several divisions of the Adjustment Board shall give due notice of all hearings *to the employee* or employees and the carrier or carriers involved in any dispute submitted to them," 325 U.S. at pages 731, 734, 65 S.Ct. 1293, 1295, and this provision, with the emphasis we placed upon the phrase "to the employee" and the conjunction of the provision for "due notice" with the provision for representation "in person, by counsel, or by other representatives," was one of the statutory mainstays for our conclusion that the Act did not give the collective agent the exclusive powers over the settlement of grievances claimed for it.
>
> But we did not undertake to define what was meant by "due notice," nor do we now. "Due notice" conceivably could be given or had in a variety of forms, more especially when account is taken of the generally informal procedure of the Board. It would require at the least, we think, knowledge on the ag-

> grieved employee's part of the pendency of the proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency.[12]

The Court then concluded:

> Although under our ruling his rights to have voice in the settlement are preserved, whether by conferring with the carrier and, having seasonably done so, refusing to be bound by a settlement reached over his protest, or by having representation before the Board according to his own choice, we did not rule, and there is no basis for assuming we did, that an employee can stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property, or before the Board on their submission, allow matters to be thrashed out to a conclusion by one method or the other, and then come in for the first time to assert his individual rights.

Appellant does not dispute th fact that the Board did not furnish Appellee formal notice of its proceedings on his claim. However, the Board's failure to furnish formal notice to Appellee does not in this instance resolve the notice question. We agree with a line of Seventh Circuit decisions which have expanded on *Burley I* and *Burley II* to hold that in situations where employee-grievants have authorized their union to handle their grievances NRAB statutory notice provisions are satisfied if the employee receives actual notice of the proceedings. *See, Kotakis v. Elgin, J. & E. Ry.*, 520 F.2d 570, 576 (7th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3344 (Dec. 8, 1975); *Illinois Central R.R. v. Whitehouse*, 212 F.2d 22, 29 (7th

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12. 327 U.S. at 665-666.

13. *Id.* at 666-667.

Cir. 1954) *rev'd on other grounds,* 349 U.S. 366 (1955); *Hunter v. Atchison, T. & S.F. Ry.,* 188 F.2d 294, 301 (7th Cir. 1951).

Actual notice for this purpose is notice of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim.

A review of the record demonstrates that Appellee authorized the UTU to handle his grievance. The union represented Appellee in dealing with the carrier. When these efforts met with no success Appellee authorized the union to attempt to secure relief for Appellee from a special adjustment board. Appellee's actions leave little room for doubt about his reliance on the UTU to handle his claim before the special adjustment board, but any existing doubt must be resolved in favor of authorization in light of Article 44 of the UTU Constitution[14] which

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14. ARTICLE 44

AUTHORITY TO REPRESENT

Every member of the United Transportation Union grants complete authority to the United Transportation Union and any of its constituted representatives to act in said member's behalf for the purpose of disposing, in any manner, of any and all of said member's claims, complaints, or grievances against their employer; and to submit such claims, complaints, or grievances for determination to any person, board, or other tribunal provided by law or otherwise as may be deemed to be necessary. The United Transportation Union shall have authority to receive notice of hearings, or to waive hearing, and to appear for, represent, and act for its members before any person, board, or other tribunal in connection with consideration and determination of claims, complaints, or grievances, subject to the right of appeal in acordance with the provisions of this Constitution, except where the member involved serves reasonable written notice on the United Transportation Union to the contrary.

Decisions reached disposing of or settling claims, complaints, and grievances referred to herein shall be furnished in writing, within thirty (30) days after such decision, to the Local Chairman and Secretary of the local submitting such claims, complaints, and grievances.

grants the union "complete authority" to represent members before any "board or other tribunal."

Appellant contends that statements made by Appellee in a February 13, 1975, deposition amount to an admission of receipt of actual notice of the Board proceedings on his claim. Appellee's statements were in response to questions about his contact with UTU officials prior to the Board proceedings:

> Q. And you didn't do anything on your own to process it [the claim] yourself, I gather?
>
> A. No; I didn't. I asked them if there was anything I could do for them and they said no, they said there isn't anything we could do. I asked them if I could bring any witnesses or just come in there myself and they said there was no use.
>
> Q. Now, we are talking about a Board procedure hearing as contrasted to meeting with the management people?
>
> A. I don't quite understand that.
>
> Q. You say they told you that you couldn't do anything and I'm asking you was that with respect to a Board procedure when they were going to go before it or did that have to do when they were dealing directly with the Superintendent or whoever it was of management at a lower level?
>
> A. I asked them at the lower level. First we had the investigation; that came first and then I asked them when we went before the Board on the final one up there for the decision and they made the statement that they had four cases and mine was the best one of the four and that I didn't have to bring any witnesses in and I couldn't go in myself because it

was a closed door session is what they told me, what Murphey told me.

Q. But you knew there was going to be a hearing?

A. Oh, yes; I knew there was going to be a hearing.

Q. And they told you though that there wasn't any sense in going?

A. Right."[15]

Appellee's statements indicate that he knew in advance that the Board would be conducting a hearing on his claim. However, Appellee's statements also vividly demonstrate that he did not understand the workings of the Board. His reference to the Board as the "Labor Relations Board" and his requests to be present and present witnesses are further indicia of his lack of understanding. Appellant has not attempted to refute Appellee's statements concerning the union officials telling him that he could not attend the hearing on his claim and that his witnesses would not be needed. Thus the only inference which may be drawn from the record is that Appellee was not allowed to convey information which might have been helpful in presenting his claim. The union cannot contend that Appellee's right to effective presentation of his claim to the Board, as guaranteed by Section 153 First (j), has been preserved when he was prevented from conveying potentially helpful information to the Board via union officials. Appellee did not receive notice sufficient to obviate the provision to him of formal notice as required by Section 153 First (j). As the district court noted in concluding that the Board's original determination was improper:

15. Appellant's Appendix at 45-46.

> "Without a formal notice from the Board, plaintiff was foreclosed from making the very decision [to represent himself or to be represented by counsel or by union representatives] which § 9 First (j) empowers him to make; thus his failure to act affirmatively cannot be held to have been a waiver of his right."[16]

The judgment of the district court is affirmed.

ENGEL, *Circuit Judge*, dissenting. I agree with the majority that the district court had jurisdiction to exercise a limited judicial review over the determination of the special adjustment board. I further agree with the majority that the provisions of § 153 First (j) apply to proceedings before special adjustment boards under 45 U.S.C. § 153 Second. I am unable, however, to agree that the appellee did not receive notice sufficient to satisfy § 153 First (j), especially in view of the majority's clearly supported finding that the appellee authorized the U.T.U. to handle his grievance, both personally and by virtue of the authorization contained in Article 44 of the U.T.U. Constitution.

As appellee himself acknowledged, he knew in advance that the Board would be conducting a hearing on his claim and expected the union to represent him personally. Apparently, the majority opinion holds what the Supreme Court in *Burley II* expressly ruled it would not hold:

> ". . . that any employee can stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property, or before the board on their submission, allow matters to be threshed out to a conclusion by one method or the other, and then come in for

16. *Cole* v. *Erie Lackawanna Ry.*, 396 F. Supp. 65, 69 (N.D. Ohio 1975).

the first time to assert his individual rights." *Burley II, supra,* at 666.

The majority appears to construe the holding in *Burley I* and *II* to require both employee authorization to the union to prosecute his individual claim *and* formal or actual notice. However, the Supreme Court in the *Burley* decisions held that the rights accorded by § 153 First (j) ". . . 'are statutory rights, which he may exercise independently *or authorize the union to exercise in his behalf*'". *Czosek v. O'Mara,* 397 U.S. 25, 28 n. 1 (1970), quoting *Burley I, supra,* at 740 n. 39 (emphasis added). The question of actual notice is important only insofar as it infers authority by estoppel. "Even the ordinary law of agency attributes authority to a representative to act when the principal stands by with knowledge or notice of his assumption of that authority and permits the third person to act to his injury upon the same assumption." *Burley II, supra,* at 665 n. 7. Thus, the Second Circuit in *Pyzynski v. New York Central R.R.,* 421 F.2d 854, 859, 860 (2nd Cir. 1970), stated:

> "The *Burley* decisions may be said to have held that a carrier may rely on the authority of a union to negotiate a conclusive settlement of an employee's grievance if it can be shown either that the union acted upon the basis of actual authority, whether individually given or to be gathered from the union constitution or by-laws or from custom and usage *or* that the employee had notice or knowledge of the actions taken by the union in his behalf and took no steps to negate the union's authority." (emphasis added)

The dictates of *Burley* have been satisfied in the instant case both by granted authority (individually given and

by the union constitution) and the actual knowledge possessed by Cole.

Nor do I understand *Kotakis v. Elgin, J. & E. Ry.,* 520 F.2d 570 (7th Cir. 1975); *Illinois Central R.R. v. Whitehouse,* 212 F.2d 22 (7th Cir. 1954), *rev'd on other grounds,* 349 U.S. 366 (1955), and *Hunter v. Atchison, T. & S.F. Ry.,* 188 F.2d 294 (7th Cir. 1951) to have expanded *Burley I* and *Burley II* to invalidate the Board hearing in the instant case.

In *Kotakis, supra,* at 576, the court simply observed:

> "Moreover, the record discloses that plaintiff knew his grievance had been submitted to the adjustment board and that he had authorized the union to represent him here. That satisfies the notice requirement."

In *Illinois Central v. Whitehouse, supra,* the court held only that the notice was required to be sent to a second union in a dispute primarily between the railroad and petitioning union because the second union's interests were impinged, and finally, in *Hunter v. Atchison, supra,* the court held that "actual notice of the hearings for a sufficient period prior thereto to permit plaintiffs to be present and to be heard is all that is required". However, plaintiffs in *Hunter* were not members of the union which had petitioned the Board to decide whether its members or plaintiffs were entitled to certain jobs with the carrier. Therefore, there was obviously no question of whether the union was authorized to act on behalf of plaintiffs. It was not. Their interests were adverse.

The effect of the majority opinion, as I see it, is to give the employee and the union a second bite of the apple merely by their mutual agreement that union representation was inadequate, a confession easy to make when the union suffers no penalty and difficult, if not impossible,

to refute by the Board or the carrier since neither has been privy to the incident.

The better course, I believe, is to leave the employee to his remedy against the union for breach of its duty of fair representation. It is significant, I think, that this duty was originally created in the specific context of the Railway Labor Act, *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944). *Steele* in turn provided the blueprint for *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). See also *Czosek v. O'Mara*, 397 U.S. 25 (1970). Resort to this line of decisions as a remedy for the type of complaint here has the advantage of preserving the integrity of established grievance procedures. The Board and the carrier may deal with confidence with the union. The union is not undercut by Board and carrier efforts to by-pass it in order to ascertain whether it actually represents the employee. The employee benefits because the union will be encouraged to present the carrier's best case the first time around and may be penalized by its failure to represent the employee fairly.

Finally, I am unable to see upon the facts in this case how more formal or direct notice to Mr. Cole would have affected his course of action. He clearly authorized the union to represent him. He conferred with the union and acted on its advice and counsel. The difficulty is not in the notice; it is in the advice which the union gave Cole after the notice. As a practical matter a union member will invariably follow the advice of his union agent over the advice contained in a notice given him by the carrier or the Board, however formal or detailed.

I would reverse the judgment of the district court and remand for entry of judgment denying enforcement of the award.

OPINION AND ORDER OF THE DISTRICT COURT

(Filed May 5, 1975)

No. C 73-70

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

L. F. COLE,
Plaintiff,

vs.

THE NATIONAL RAILROAD ADJUSTMENT BOARD, *et al.*,
Defendants.

OPINION and ORDER

WALINSKI, *J.*:

This cause is before the Court on plaintiff's motion for summary judgment and defendants' corresponding motion to vacate this Court's earlier Order of February 6, 1974. Both sides have extensively briefed these matters.

Before resolving this dispute, it is useful to set out briefly the past developments in this case. This cause was originally filed February 9, 1973, as a petition under § 3 First (q) of the Railway Labor Act to set aside an award of a special adjustment board which had upheld plaintiff's dismissal from employment with the defendant. On February 6, 1974, this Court, upon cross motions for summary judgment, ordered this cause remanded to the special adjustment board [hereinafter the Board] for re-

consideration upon due notice to the plaintiff and that he be afforded the opportunity to be heard through counsel and present evidence on his behalf. The decision was based on the Court's conclusion that plaintiff had not been given due notice of the Board's hearing and had been denied the opportunity to be heard through counsel and to present evidence.

The Board was subsequently reconvened and after due notice held a hearing on August 19 and 20, 1974, at which plaintiff was heard through counsel and presented evidence. Thereafter, on October 28, 1974, the Board entered an award in favor of plaintiff in which he was restored to duty with full seniority rights, vacation, and all privileges. His discharge from employment was converted to a disciplinary lay-off of 365 days, and he was awarded back pay for the time from the end of the disciplinary lay-off to the date of restoration to duty. By his motion for summary judgment, plaintiff seeks to have this award enforced, pursuant to § 3 Second of the Act.

Defendant not only opposes enforcement of this award, but also asks the Court now, nearly fifteen (15) months afterward, to go back and set aside the February 6, 1974 Order of the Court on the grounds that a statement was "erroneous" and that plaintiff in fact had actual knowledge of the first hearing by the Board at which plaintiff's discharge was considered. Plaintiff argues in rebuttal that defendant's motion is untimely according to the provisions of Rules 59 and 60, Federal Rules of Civil Procedure, and that if defendant objected to the February 6th Order, he should have complied timely with these rules or have taken an appeal since the February 6th Order was clearly a final, appealable Order.

There is no doubt in the Court's mind that defendant is correct in arguing that a separate document had to

be filed in compliance with Rule 58 in order for the time limitations of Rules 59 and 60 to be applicable. *United States v. Indrelunas*, 411 U.S. 216 (1973); *Columbus Coated Fabrics v. Industrial Comm. of Ohio*, 498 F.2d 408 (6th Cir. 1974).

However, the Court is troubled by letting defendant now reopen the issues underlying the February 6th Order, especially after the matter has been remanded to the Board, new hearings held, and an award entered. Obviously, the prejudice and expense to plaintiff are great in so doing. Plaintiff, quite properly, had reason to believe that these matters were decided and at rest, in the face of defendant's failure to appeal, or move for reconsideration, *before* the Board's rehearing. It could be fairly said that defendant is guilty of the very kind of wait-and-see-which-way-the-wind-blows tactics which it accuses plaintiff of pursuing before this lawsuit was filed.

Any prejudice to defendant in refusing now to reopen the February 6th Order is avoided, however, if defendant's contentions regarding due notice and actual knowledge are without merit. These new contentions stem from certain responses given by plaintiff during an oral deposition on February 13, 1975. From these it is now argued that plaintiff had actual knowledge of the Board's first consideration of the matter, sufficient to constitute due notice, and that he stood by and "allow[ed] matters to be thrashed out to a conclusion." Only then, disappointed with the result, did he file the present suit claiming he was deprived of notice and an opportunity to be heard.

The Court has carefully reviewed the transcript of this deposition and has concluded that, even if defendant is given the benefit of all favorable inferences, nothing therein sustains its argument. (The relevant portions are attached hereto as an appendix.) It should be remembered

in this context that the kind of notice or knowledge, required by § 3 First (j) is, in the words of one court:

> "[a]ctual notice of the hearings for a sufficient period prior thereto to permit [plaintiff] to be present and to be heard * * *." *Hunter v. Atchison, T. & S. F. Ry. Co.*, 188 F.2d 294 (7th Cir. 1951).

Even assuming that plaintiff's answers could be held to be an admission that he had actual knowledge that "proceedings [were] pending before the [Board] to dispose of" his claim, an assumption the Court has no hesitation in rejecting, there are compelling doubts that he had any such knowledge in sufficient time to permit him to retain counsel, gather his witnesses and be present at the Board's hearing so as to be heard. Moreover, it is clear, notwithstanding whether the Union breached any duty of fair representation in telling plaintiff that he could not be present at the Board's hearing, that all doubts would have been removed if the Board itself had simply served formal notice on the plaintiff of the pendency of its proceedings. There can be no doubt that this is a clear duty imposed on the Board by § 3 First (j) of the Act.

Defendant also argues, in this regard, that plaintiff had authorized the Union to handle his grievance and to represent him before the Board and that plaintiff did not act, as his Union Constitution required him to do, so as to revoke the authority and assume his own representation.

It is true as defendant argues that:

> "A carrier may rely on the authority of a union to negotiate a conclusive settlement of an employee's grievance if it can be shown either that the union acted upon the basis of actual authority, whether individually given or to be gathered from the union constitution or by-laws or from custom and usage or that the employee had notice or knowledge of the actions taken by the union in his behalf and took no steps to negate the union's authority." *Pyzynski v. New York Cent. Rd. Co.*, 421 F.2d 854, 859-60 (2nd Cir. 1970), *interpreting Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711 (1945), *on rehearing* 327 U.S. 661 (1946).

Within the context of the facts of *Pyzynski*, this Court is in complete agreement with that proposition.

However, in the case at bar, there is no written authorization empowering the union to represent plaintiff at the Board hearing and relinguishing his right to be present with counsel, as there was by analogy in *Pyzynski*. *Id.* fn. 9 at 860. Moreover, as has been shown, plaintiff could not be said to have had notice or knowledge of the actions taken by the union on his behalf. Here all he "knew" was a sort of a vague notion that the union would "get his job back."

Moreover, this Court feels that company reliance on the Union Constitution or by-laws or on custom and usage is more appropriate where the dispute involves a group of its employees over, e.g., which union's members are going to perform a specific job. In that kind of dispute, it is clear that the policies of peaceful settlement through collective bargaining which underlie our federal labor laws dictate that the railroad may reasonably rely on the apparent authority of the union to settle the matter or represent its members before a board of arbitration.

These policies give way however when the dispute is between a single employee and the company who employs him. In such a case the union's interest in settling such a dispute, and the character of representation it feels

it can give, are often at odds with the individual's interest in preserving his means of livelihood. Thus, in recognizing these interests, Congress specifically gave the employee the right to appear on his own, and with his own counsel, in hearings which will decide the issue of greatest importance to him.

This Court obviously feels, unlike the *Pyzynski* court, that subsequent events since the *Burley* decisions have not diminished any urgency to give individual employees considerable leeway in pursuing their own grievances. *Pyzynski, supra* at 861-864. A union member faces considerable obstacles in attempting to establish a claim of breach of the duty of fair representation by his union. In order to make such a claim plaintiff would have to prove "arbitrary or bad faith conduct on the part of the union." *Vaca v. Sipes,* 386 U.S. 171, 193 (1967). He would, moreover, find it necessary:

> "to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives * * *." *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 301 (1971).

Since the union is entitled by federal labor policy to make good faith judgments as to when and how far it will press an individual employee's grievance, and the same federal policies dictate a need that the union may only be sued by that member for bad faith, intentionally severe, and irrational conduct, it is clear that there is a definite need for considerable leeway to permit the member to pursue his own grievance. Otherwise, the member is left with the impossible situation of permitting the union to press his claim behind closed doors and giving him no practical legal remedy when the union's representation has been deficient.

The fact that an employee may be required to join the union only points up more clearly the urgent need for permitting him to press his own claim and to secure his own future.

> "Men at some time are masters of
> their fates:
>
> The fault, dear Brutus, is not
> in our stars,
>
> But in ourselves, that we are
> underlings."

Shakespeare, *Julius Caesar,* Act I, scene ii.

Finally, in arguing that plaintiff failed to act affirmatively so as to assume his own representation, defendant appears to overlook the extent to which plaintiff seems to have been deceived, albeit unintentionally, by the appearance of regularity.

Plaintiff claims, and defendant does not dispute, that he contacted union officials and specifically stated his interest in being present at the hearing. He further stated that he had witnesses who would apparently testify about the events which led to his dismissal and that he wanted to have them present; but the union told him that that wouldn't be necessary and that he didn't need to bring his witnesses. Thus, it is apparent that plaintiff was denied any opportunity to conduct his own representation before the Board which, failing to notify him formally of the pendency of its proceedings and his right to be present, helped to foster this illusion of propriety.

In *Hollingsworth v. Balcom,* 441 F.2d 419 (6th Cir. 1971), the court considered a claim by a naval reservist who contended that he had been denied notice that a hearing crucial to his application for discharge as a con-

scientious objector, was to be held and that his failure to object to continuation of the hearing did not constitute a waiver of his right to have counsel present. The district court had found that when he was summoned for an interview with his commanding officer, he was not told that it was to be the crucial hearing. He was further told that it would not be necessary to bring his lawyer with him in spite of the commanding officer's knowing that the reservist had consulted counsel.

In agreeing with the reservist's contentions, the Sixth Circuit said:

> "[a]ccepting as we must the finding of the District Court that appellant must have realized at some point that the [hearing] was being held, we think that the lack of prior notice and the 'appearance of regularity' [citing *Yellin v. United States*, 374 U.S. 109, 123 (1963)] dissuaded him from objecting. We cannot agree that his failure to stop the [hearing] amounted to a waiver of his right." *Id.* at 424.

This Court feels that much the same considerations apply here. Without a formal notice from the Board, plaintiff was foreclosed from making the very decision which § 3 First (j) empowers him to make; thus, his failure to act affirmatively cannot be held to have been a waiver of his right. Accordingly, the Court has concluded that the February 6th Order shall stand that that defendant's motion is not well taken.

As to plaintiff's motion for summary judgment, it is equally clear that he is entitled to have the Board's award of October 28, 1974, enforced. Section 3 First (p) provides for such enforcement and all of the procedural requirements appear to have been followed. The Court sees no need for any further delay in plaintiff resuming the employment to which the Board felt he was entitled.

Accordingly, it is

ORDERED that the Award of Public Law Board No. 855 of October 28, 1974, relative to the plaintiff herein, be enforced in accordance with its terms, and defendant Erie Lackawanna Railway Company is hereby ORDERED to comply with the provisions of this Award.

/s/ NICHOLAS J. WALINSKI
United States District Judge

OPINION AND ORDER OF THE DISTRICT COURT

(Filed February 6, 1974)

No. C 73-70

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

L.F. COLE,
Plaintiff,

vs.

THE NATIONAL RAILROAD ADJUSTMENT BOARD, *et al.*,
Defendants.

OPINION AND ORDER

WALINSKI, *J.*:

This cause is before the Court on cross motions for summary judgment. Both motions have been supported by affidavits as well as extensive briefs. There appears to be absolutely no dispute as to the relevant facts.

Petitioner brings this cause as a petition to review a decision of a special adjustment board created pursuant to 45 U.S.C., § 153, Second. He argues that the Board decision should be set aside because *inter alia* of the failure of the Board to give due notice of all hearings to him, the failure to hear him in person, by counsel or by other representatives, and the failure of the Board to conduct hearings and allow him to present witnesses on his behalf.

The respondent railroad contends that this Court lacks jurisdiction to review a decision of a special adjustment board created pursuant to 45 U.S.C., § 153, Second, and that the decision is final and binding on the parties. Alternatively, respondent argues that there was no defect in notice or the opportunity to be heard that rises to the level of a denial of procedural due process.

It appears that the facts which gave rise to this dispute began on March 16, 1971, when the petitioner, an employee of the respondent, was assigned to provide flag protection for men engaged in the construction of a highway bridge over the railroad's tracks near North Lewisburg, Ohio. It appears that he arranged for an employee of the construction crew to drive out on to the track so as to flag any oncoming trains while he stayed near a telephone in order to receive, as instructed, information from his railroad employer as to the scheduling of trains through the area. The construction worker, not a railroad employee, apparently flagged an oncoming train to a stop several car lengths from the construction site. As a result of this, petitioner received a letter from respondent on March 22, 1971, that an investigation hearing concerning the incident would be held four days later in the office of the employer. The letter further stated that Cole had allegedly violated several company regulations, all of which were of such a general character that he must have been

bewildered as to the precise nature of his infraction and how best to prepare for his defense.

In any event, the hearing was held on March 26th and petitioner was notified on April 7, 1971, that, as a result thereof, he had been dismissed from his employment. On September 2, 1971, the general manager in charge of labor relations for respondent denied Cole's intercompany appeal.

Apparently Cole now decided to pursue the grievance procedure as provided by the relative collective bargaining agreement. The union and the company had apparently resorted in the past to the provisions of 45 U.S.C., § 153, Second, which permits a railroad and union to create a special board of adjustment to settle minor disputes and grievances. And so, the parties entered into such an agreement on December 10, 1971, to create Public Law Board 855 [hereinafter the Board], and further agreed that petitioner Cole's grievance would be one of the matters submitted to the Board for decision.

At this time Cole had long since been dismissed from the railroad's employment. The facts further show that he probably terminated his membership in the union after April, 1971. The affidavit submitted by the company's general manager shows that union dues were deducted from Cole's pay in March, 1971, for the following month. And Cole states in his affidavit that he was not a member of the union when the Board decided his case.

Both the company and the union made a presentation to the Board concerning Cole's grievance. There is no record of any presentation by Cole himself. The Board's decision on June 1, 1972, states that all the parties to the dispute were given due notice of the hearing; but there is nothing in the record showing any notice to peti-

tioner of any impending hearing. Moreover, Cole's affidavit, uncontroverted by anything from respondent, shows that he received no notice of any kind, that he did not designate anyone to appear on his behalf, and that no witnesses appeared on his behalf. The Board affirmed the company's dismissal.

In his petition before this Court petitioner invokes jurisdiction under 45 U.S.C., § 153, First (q), and prays that the Board's decision be set aside and that he be reinstated to his former position with the railroad with full seniority and other rights, and that he recover back pay to the date of his dismissal as well as attorney fees.

Respondent argues that § 153, First (*q*), is appropriate only to review decisions of the National Railway Adjustment Board, and that since this is a decision of a special adjustment board created under § 153, *Second*, this Court lacks jurisdiction. Even if the Court has jurisdiction, it is further contended that the Court is powerless to do anything but affirm the Board order, set it aside in whole or part, or remand to the Board for further proceedings. Respondent finally argues that this petition reveals no basis to do anything but affirm the Board order since Cole was represented by the union and therefore had due notice.

Before deciding these issues, the Court finds it useful to review some of the legislative history of the relevant statute. What is now § 153, *Second* originated in 1966 as an amendment to the Railway Labor Act, 45 U.S.C., §§ 151 *et seq*. That Act, passed in 1934, had created the National Railroad Adjustment Board [hereinafter the NRAB] to settle disputes in the nation's railroads as to pay disputes, rules or working conditions. The NRAB had worked well in many respects, but by the mid-1960's, a backlog of cases had built up in two of its four divisions.

Moreover, while the original Act had provided for a limited form of judicial review in the district courts, there was no way that an employee who was aggrieved by an NRAB decision against him could obtain judicial review. However, a railroad, against whom the NRAB had made an award, could obtain review simply by declining to comply with it. Therefore the Congress felt that equal opportunity for access to the courts for limited review should be afforded and that some means for settlement of minor disputes short of going to the NRAB should be provided. The result of all this was H. R. 706 which was passed in February, 1966, by the House of Representatives.

The bill amended 45 U.S.C., § 153, *Second* so as to empower the railroads and unions to create special boards of adjustment to settle minor disputes. Section 153, *First* (q) was added so as to equalize the limited means of judicial review of NRAB decisions. The Senate Committee Report further noted that:

> "The bill also provides that judicial review of orders * * * of boards established under this legislation, relating to minor disputes in the railroad industry would be available to either party * * *." Senate Report No. 1201, 89th Congress, 1966 *U. S. Code Cong. & Admin. News* 2285, at 2289.

The bill was then passed by the Senate June 7, 1966, and signed into law.

From the foregoing, it is clear that respondent's contentions as to this Court's lack of jurisdiction are not well taken. His contention, that the final sentence of § 153, Second means that a district court only has jurisdiction to review an award in favor of petitioner, would lead to the very condition of unequal access to the courts that Congress sought to eliminate. Respondent cannot

seriously mean that Congress, in creating the special boards of adjustment, intended to provide for the very kind of inequitable form of judicial review which had led it in part to amend the RLA in the first place. Most of the courts which have considered this contention have rejected it. *See, e.g., Trans.-Comm. Div.—Brotherhood of Railway Employees v. St. Louis-San Fran. R. Co.*, 419 F.2d 933, 935 (8th Cir. 1969); *U.T.U. v. Pitts, Chartiers & Youghiogheny R. Co.*, 353 F. Supp. 1305, 1306 (W.D. Pa. 1973); *Brotherhood of Railway Carmen v. St. Louis-San Fran. R. Co.*, 334 F. Supp. 764, 768-9 (W.D. Mo. 1971); *U.T.U. v. Patapsco & Back Rivers R. Co.*, 327 F. Supp. 608, 610-12 (D. Md. 1971); *Barrett v. Manufacturer's R. Co.*, 326 F. Supp. 639, 643-4 (E.D. Mo. 1971); *Balt. & Annap. R. Co. v. National Mediation Bd.*, 321 F. Supp. 51, 55-7 (D. Md. 1970); and *Switchmen's Union v. Clinchfield R. Co.*, 310 F. Supp. 606, 610-11 (E.D. Tenn. 1969), *aff'd*, 427 F.2d 161, *cert. denied*, 400 U.S. 824. Therefore this Court holds that it has jurisdiction over the subject matter of the petition now before it.

Having established that it has jurisdiction to review the decision of the Board, the Court takes notice that its scope of review is very narrow. Section 153, First (q), provides that the Court may affirm the Board decision, or set it aside, or remand the proceeding to the Board for further action. The decision of the Board may only be set aside or remanded:

> "* * * for failure of the [Board] to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the [Board's] jurisdiction, or for fraud or corruption by a member of the [Board] making the order." 45 U.S.C., § 153, First (q).

Petitioner claims that the Board failed to comply, in making its decision, with the requirements of 45 U.S.C., § 153, First (j) which states as follows:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

The respondent railroad vigorously contends that this section does not apply to proceedings before a special adjustment board; and that, in any event, petitioner was ably represented by his union. This Court feels that repondent's contention ignores the legislative history, as well as the plain language, of the statute.

The previously mentioned Senate Committee Report explicitly stated that judicial review of special adjustment board decisions would specifically include, like NRAB decisions, whether the tribunal complied with the statutory requirements. 1966 *U.S. Code Cong. and Admin. News* 2285, at 2289. Moreover, since § 153, Second incorporates § 153, First (q), the former also incorporates § 153, First (j), since it is a requirement of the chapter. *See Central of Ga. R. Co. v. U.T.U.*, 353 F. Supp. 293, 301 (S.D. Ga. 1973). *Cf. Baltimore & Annap. R. Co. v. National Mediation Board*, 321 F. Supp. 51 (D. Md. 1970).

It is apparent to this Court that Public Law Board No. 855 failed to comply with the requirements of subsection (j). The record shows that petitioner was not sent, and did not receive, any notice that his petition was being considered by the Board. Having been deprived of due

notice,[1] he was surely deprived of the right to appear either in person or through counsel as the statute permits.

This Court is further unable to understand how petitioner could have been represented by a union of which he was no longer a member. The rights of this petitioner in claiming his former position are too important to be waved away with the airy contention that the union represented him. This Court questions the vigor of a union representing a former member from whom it no longer receives monthly dues. For this reason, this Court holds that petitioner was not represented before the Board and that its decision must be set aside. *See Elgin, Joliet & Eastern, R. Co. v. Burley,* 325 U.S. 711, 748 (1945). *Compare Ellerd v. Southern Pacific R. Co.,* 241 F.2d 541 (7th Cir. 1957).

One final matter remains. Petitioner named the NRAB as a party to this suit. Yet it is apparent from all of the foregoing that the NRAB is not really a proper party, while Public Law Board No. 855 is. Therefore, the NRAB will be dismissed and petitioner will be granted leave to amend his petition so as to name Public Law Board No. 855 as a respondent party.

For the foregoing reasons,

IT IS ORDERED that the decision of Public Law Board No. 855 of June 1, 1972, relative to the petitioner herein, be, and hereby is, set aside and held to be null and void.

---

1. It should be noted that the regulations which petitioner allegedly violated are so vague as to raise serious question as to defend against the charges. On remand the Board should consider the propriety of ordering reinstatement in view of that fact.

IT IS FURTHER ORDERED that the matter be, and hereby is, remanded to Public Law Board No. 855 for reconsideration upon due notice to the petitioner, and that he be given the opportunity to be heard through counsel and to present witnesses on his behalf.